Supreme Court, U.S.
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No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE UNITED STATES

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Although the brief in opposition largely ignores the main arguments set forth in our petition, we reply briefly to clarify the issues before the Court.

1. Respondent's principal rhetorical point (Br. in Opp. 11-14) is that the petition in some way ignores or fails to account for this Court's holding in *Kastigar v. United States*, 406 U.S. 441 (1972). He is wrong. The first three paragraphs of the Reasons for Granting the Petition address *Kastigar* directly. Specifically, we noted the tension in this Court's jurisprudence between *Kastigar*, on the one hand, and *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), on the other hand. As the petition explains (and as the response illustrates), respondent—and the court of appeals

—view *Kastigar* as requiring a sweeping, absolute immunity that bars any use of the contents of documents produced to the government under compulsion. In our view, the logic of *Schmerber v. California*, 384 U.S. 757 (1966), coupled with the post-*Schmerber* statements in *Fisher* and *Doe* with respect to the limited constitutional protection for the contents of voluntarily recorded documents, indicates that the Constitution necessarily permits that use (at least in cases, like this one, in which the government need not establish the existence or authenticity of the documents or the defendant's possession of them). The tension that led to the lower court's misunderstanding of those cases arises directly out of the interplay among this Court's decisions; the tension can be resolved only by this Court's intervention.

2. Respondent also suggests (Br. in Opp. 15-16) that the procedural posture of the case renders it a poor vehicle for review, apparently because "there was no hearing on remand and no record made with respect to the foregone conclusion issue" (Br. in Opp. 16). Respondent is mistaken; the posture of the case in fact strongly favors review. The plea agreement into which the parties entered after remand crystallizes the case into purely legal questions, because it renders any subsidiary factual questions definitively irrelevant to the disposition of the case.*

At bottom, under the standard articulated by the panel majority, the government could not practicably continue

* The technically interlocutory status of the case does not undermine the Court's jurisdiction nor, given the practical finality wrought by the plea agreement, does it even counsel against review now. *See generally* R. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993) (explaining that certiorari jurisdiction regularly has been exercised in non-final cases when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari").

with this prosecution. The reason is this: We readily concede that the government could not make a case against respondent without use of the contents of the documents he delivered to us. Conversely, Hubbell's agreement to enter a conditional plea reflects the reality that under the standard we urge his guilt would be so readily established that he should plead guilty and submit to punishment for some portion of the criminal conduct alleged in the indictment.

This is, in short, a case in which the questions presented by the petition are indisputably outcome-determinative. In consequence, there can be no doubt that the petition presents a controversy of the type appropriate for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1999

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